TESTIMONY OF ELDON GREENBERG
CONCERNING THE RELATIONSHIP BETWEEN
THE MAGNUSON-STEVENS FISHERY CONSERVATION AND MANAGEMENT ACT
AND THE NATIONAL ENVIRONMENTAL POLICY ACT
BEFORE THE
SUBCOMMITTEE ON FISHERIES AND OCEANS
HOUSE COMMITTEE ON RESOURCES
WASHINGTON, D.C.
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Good morning. My name is Eldon Greenberg, and I am a partner in the Washington, D.C. office of the law firm of Garvey Schubert Barer.[1] I am pleased to be here today to address the relationship between the Magnuson-Stevens Fishery Conservation and Management Act (the "Magnuson-Stevens Act") and the National Environmental Policy Act ("NEPA"). I have extensive experience with the application of both statutes, having worked on their implementation when I was General Counsel of the National Oceanic and Atmospheric Administration ("NOAA") in the Carter Administration, and having represented numerous private parties in Magnuson-Stevens Act/NEPA administrative proceedings and litigation. I thus hope that my perspective will be of use to the Committee. I am not testifying today on behalf of any company or organization, and the views I express are entirely my own.

Both NEPA and the Magnuson-Stevens Act share the laudable purpose that Federal agencies should engage in a reasoned decision-making process when taking actions that may affect public resources. The Magnuson-Stevens Act contains National Standards, elaborated now over the course of almost three decades, to ensure the wise

[1] My firm's address and telephone number are: 1000 Potomac Street, N.W., Suite 500, Washington, D.C. 20007; (202) 965-7880. I am reachable at: egreenberg@gsblaw.com.

conservation and management of fishery resources. Its procedures for participation by interested parties and transparency of agency deliberations help guarantee that the environmental implications of resources decisions are fully understood by agency decision-makers and private stakeholders. NEPA, for its part, establishes its own procedural mechanisms for environmental review that, in the words of the Supreme Court, "prohibit[] uninformed . . . agency action."[2]

Whether NEPA is truly necessary to inform Magnuson-Stevens Act decision-making, rather than merely redundant, is a question that has been much debated, especially in recent years. It has been suggested, for example, that, since fishery management plans might be regarded as providing the "functional equivalent" of an environmental assessment or environmental impact statement, NEPA's requirements can be dispensed with altogether, just as such documents are not required for various regulatory actions of the Environmental Protection Agency under the Clean Air and Clean Water Acts. In my judgment, there is much merit to the argument that NEPA adds little to the analytical requirements of the Magnuson-Stevens Act. Leaving that broader question to one side, however, it seems to me to be undeniable that there are practical problems in integrating the two statutory mandates. In such circumstances, there is an incentive to avoid inconsistencies and conflicts, eliminate redundancies and overlap and reduce needless complexity. In my testimony this morning, I would like to focus on three specific problems and then suggest one possible way of going about solving those problems.

[2] *See Robertson v. Methow Valley Citizens Association*, 490 U.S. 332, 351 (1989).

(1) <u>Deciding Who Is In Charge</u>. The late Senator Magnuson was fond of remarking that the Magnuson-Stevens Act creates a "unique system of government." There is no other statute of which I am aware which utilizes a mechanism quite like the regional fishery management council or establishes a relationship quite like that between the councils and the Secretary of Commerce. In this system, the councils are the basic policy-makers, while the Secretary's responsibility is to ensure that conservation and management measures conform with the law.[3] To date, however, NEPA has been implemented in a way that doesn't quite fit this model. In fact, as documented in a 2002 report for the North Pacific Fishery Management Council, the applicable NOAA Administrative Order governing NEPA compliance (NAO 216-6) "provides little guidance on the role of the regional fishery management councils in implementing NEPA," and "there is no explanation how the council becomes involved in the decision making process, or what happens if the council and NMFS disagree."[4] Thus, there is considerable uncertainty, for example, whether it is the council or the Secretary who should make the ultimate policy decisions embodied in a NEPA Record of Decision. To my mind, since the council sets fishery management policy, this should responsibility plainly lie within the province of the councils. Unfortunately, I am not sure that current law provides quite so definitive an answer.

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[3] *See, e.g.*, H. Rep. No. 97-438 at 8-9 (1982) ("The Councils, not the Secretary, are to manage fisheries within their respective areas") ; H. Rep. No. 97-549 at 28 (1982), *reprinted in* 1982 U.S. Code, Cong. and Admin. News 4341 ("[T]he Secretary is not to substitute his judgment for that of the Councils regarding how to manage a fishery").

[4] *See* Walsh, Rieser and Wilson, "Legal Assessment of the Council's Role under the Magnuson-Stevens Act, the Endangered Species Act and the National Environmental Policy Act" at 34 (Sept. 2002).

(2) <u>Unmoored Programmatic Reviews</u>. One the most difficult problems under NEPA has been how to prepare "programmatic reviews" of fishery management plans. In the early years of the Magnuson-Stevens Act, where fishery management plans were just being approved, a corresponding programmatic NEPA review was sensible and could be readily integrated into decision-making about specific management measures. More recently, however, particularly as the result of orders in litigation,[5] broad-scale programmatic reviews have been undertaken without reference to specific management proposals before the councils. The result has been massive documents that have taken years to complete and that virtually defy comprehension. Moreover, as the National Academy of Public Administration noted in 2002, such analyses, given the complexity of the task, often set out a bewildering array of combinations of alternatives and impacts.[6] Furthermore, the alternatives presented may bear little relation to real fishery management choices under the Magnuson-Stevens Act. The usefulness of this kind of costly and time-consuming review needs to be carefully assessed.

(3) <u>Living With The Time Constraints Of The Fishery Management Process</u>. Fishery management is a highly dynamic process. There is an overriding imperative to use the most current data available, because the status of stocks is so variable. In many fisheries, the councils need to rely on recent survey data in making annual management decisions, such as setting total allowable catch levels, establishing by-catch rates and adjusting allocations among user groups. While environmental

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[5] *E.g., Ramsey v. Kantor*, 96 F.3d 434 (9th Cir. 1996); *Greenpeace v. NMFS*, 55 F. Supp. 2d 1248 (W.D. Wash. 1999).

[6] *See* National Academy of Public Administration, "Congress, Courts and Constituencies: Managing Fisheries by Default" at 49 (July 2002).

assessments, with their more truncated procedures, may lend themselves to use in this kind of process, the preparation of environmental impact statements, with the extensive review that entails, creates a quandary for the councils, since the full-scale NEPA review often cannot readily be accommodated to the need of the councils to take timely management action. The councils should not be put in the untenable position where, to meet NEPA's procedural requirements, they are forced to abandon reliance on the most current data available and instead rely on inadequate and out-of-date data, contrary to National Standard No. 2 of the Magnuson-Stevens Act.

(4) A Possible Solution: The "FACA Amendments" Model. Congress faced similar problems of meshing two statutes with compatible aims but sometimes conflicting procedures that unduly constrained the fishery management process when, in 1982, it amended the Magnuson-Stevens Act to adapt the requirements of the Federal Advisory Committee Act ("FACA") to the realities of the Magnuson-Stevens Act decision-making process.[7] It did so, not by junking the valuable part of FACA's procedural protections but rather by taking the most meaningful elements of FACA, and integrating them into the Magnuson-Stevens Act management system.[8] A similar legislative exercise, reviewing the requirements of NEPA and their application in detail, and then, to the extent any such elements are not already effectively covered by existing provisions of the Magnuson-Stevens Act, adapting and adopting them as part of the Magnuson-Stevens Act, could well produce valuable results. Such an approach would, I believe, be consistent with the recent Main Conference Panel Findings on

[7] *See* Pub. L. No. 97-453, sec. 5 (Jan. 12, 1983).

[8] *See* H. Rep. No. 97-549 at 14-17 (1982), *reprinted in* 1982 U.S. Code, Cong. and Admin. News 4327-4330.

“Reconciling Statutes” at the March 24-26, 2005 Managing Our Nation’s Fisheries II Conference.

Thank you for your consideration. I would be happy to answer any questions the Committee might have.